

# Joint Employment and the National Labor Relations Act

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# Joint Employment and the National Labor Relations Act

The National Labor Relations Act (NLRA) recognizes the right of most private sector employees to engage in collective bargaining through their chosen representatives. By "encouraging the practice and procedure of collective bargaining," the act attempts to mitigate and eliminate the causes of labor-related obstructions that impair the free flow of commerce. The NLRA prohibits employers from interfering with, restraining, or coercing employees in the exercise of their collective bargaining rights. The act also restricts employers from refusing to bargain collectively with the unions that represent their employees.

When individuals work pursuant to an arrangement that involves more than one entity, such as a contract that provides that one business supply workers to another business, questions may arise concerning which entity should be considered the "employer" for purposes of the NLRA. Because both businesses may exercise some control over the individuals' terms and conditions of employment, one may contend that they should be considered joint employers of the individuals. On October 27, 2023, the National Labor Relations Board (NLRB) issued a final rule that establishes a new standard for determining whether two or more entities may be considered joint employers of a particular group of employees for purposes of the NLRA. Under the rule, an entity may be considered a joint employer of another entity's employees if the two "share or codetermine the employees' essential terms and conditions of employment." The rule permits the NLRB to make a joint-employer determination if an entity possesses the authority to control, either directly or indirectly, the employees' essential terms and conditions of employment, even if the entity does not actually exercise that authority.

Several groups, including the U.S. Chamber of Commerce, have opposed the rule for being "vague and expansive." Some Members of Congress have also criticized the rule, and legislation providing for the rule's disapproval under the Congressional Review Act—S.J. Res. 49 and H.J. Res. 98—has been introduced. The House of Representatives passed H.J. Res. 98 on January 12, 2024. This report provides background on joint employment and the NLRA and examines the NLRB's new joint-employer rule.

#### **SUMMARY**

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n October 27, 2023, the National Labor Relations Board (NLRB or Board) issued a final rule that establishes a new standard for determining whether two or more entities may be considered joint employers of a particular group of employees under the National Labor Relations Act (NLRA).<sup>1</sup> The Board contends that the rule "will more explicitly ground the joint-employer standard in common-law agency principles."<sup>2</sup> Under the rule, an entity may be considered a joint employer of another entity's employees if the two "share or codetermine the employees' essential terms and conditions of employment."<sup>3</sup> The rule permits the Board to make a joint-employer determination if an entity possesses the authority to control, either directly or indirectly, the employees' essential terms and conditions of employment, even if the entity does not actually exercise that authority. Several groups, including the U.S. Chamber of Commerce, have opposed the rule for being "vague and expansive."<sup>4</sup> Some Members of Congress have also criticized the rule.<sup>5</sup> On January 12, 2024, the House of Representatives passed H.J. Res. 98, which provides for the rule's disapproval under the Congressional Review Act.<sup>6</sup> This report provides background on joint employment and the NLRA and examines the NLRB's new joint-employer rule.

## Joint Employment and Browning-Ferris Industries

The NLRA recognizes the right of most private sector employees to engage in collective bargaining through their chosen representatives.<sup>7</sup> By "encouraging the practice and procedure of collective bargaining," the act attempts to mitigate and eliminate the causes of labor-related obstructions that impair the free flow of commerce.<sup>8</sup> The NLRA prohibits employers from interfering with, restraining, or coercing employees in the exercise of their collective bargaining rights.<sup>9</sup> The act also restricts employers from refusing to bargain collectively with the unions that represent their employees.<sup>10</sup>

When individuals work pursuant to an arrangement that involves more than one entity, such as working under a contract that provides that one business supply workers to another business, questions may arise concerning which entity should be considered the "employer" for purposes of the NLRA. Because both businesses may exercise some control over the individuals' terms and conditions of employment, one may contend that they should be considered joint employers of the individuals.

<sup>7</sup> 29 U.S.C. § 151.

<sup>8</sup> Id.

<sup>9</sup> Id. § 158.

<sup>10</sup> *Id.* § 158(a)(5).

<sup>&</sup>lt;sup>1</sup> Standard for Determining Joint Employer Status, 88 Fed. Reg. 73,946 (Oct. 27, 2023) (to be codified at 29 C.F.R. pt. 103); NLRA, 29 U.S.C. §§ 151–169.

<sup>&</sup>lt;sup>2</sup> Standard for Determining Joint Employer Status, 88 Fed. Reg. at 73,946.

<sup>&</sup>lt;sup>3</sup> Id.

<sup>&</sup>lt;sup>4</sup> U.S. Chamber Opposes New NLRB Rule That Creates Confusion for Employers and Workers, U.S. Chamber of Com. (Oct. 26, 2023), https://www.uschamber.com/employment-law/u-s-chamber-opposes-new-nlrb-rule-that-creates-confusion-for-employers-and-workers.

<sup>&</sup>lt;sup>5</sup> See, e.g., Press Release, Rep. John James, James Joins Bicameral Group of Legislators in Introducing Resolution to Overturn the Biden Administration's Joint Employer Rule (Nov. 9, 2023), https://james.house.gov/media/press-releases/james-joins-bicameral-group-legislators-introducing-resolution-overturn-biden.

<sup>&</sup>lt;sup>6</sup> H.R.J. Res. 98, 118th Cong. (2023). For background on the Congressional Review Act, *see* CRS In Focus IF12386, *Defining Final Agency Action for APA and CRS Review*, by Valerie C. Brannon.

The NLRA does not define the term "joint employer."<sup>11</sup> In the absence of a statutory definition, as early as 1984, both the NLRB and courts attempted to articulate a joint-employer standard.<sup>12</sup> In 2015, a majority of the Board, in reviewing whether to adhere to its then-existing standard or to adopt a new one, determined that two or more entities would be considered joint employers of a single work force if they were both considered employers under the common law definition and "if they share or codetermine those matters governing the essential terms and conditions of employment."<sup>13</sup>

The dispute in the 2015 case, *Browning-Ferris Industries*, arose after a union petitioned to represent a group of workers that had been placed in one of Browning-Ferris's recycling facilities by a staffing company, Leadpoint Business Services, pursuant to a labor services agreement. Under the agreement, Leadpoint was responsible for hiring the workers, determining their wages, and evaluating their performance. Browning-Ferris established the facility's schedule of working hours, could reject or "discontinue the use" of a Leadpoint worker at the facility for any reason, and retained other rights pursuant to the agreement.<sup>14</sup>

In 2013, an NLRB regional director concluded that Browning-Ferris and Leadpoint were not joint employers of the relevant employees.<sup>15</sup> Under the then-governing standard—which had evolved since 1984—the NLRB based joint-employer status on whether an entity shared the ability to control or codetermine essential terms and conditions of employment, as well as whether the entity actually exercised direct and immediate control over these employment matters.<sup>16</sup> The regional director determined that Browning-Ferris was not a joint employer because it did not control the daily work performed by the Leadpoint workers and its control over their terms and conditions of employment was neither direct nor immediate.

The union appealed the regional director's decision to the NLRB, and a majority of the Board's five members not only reversed the decision but adjusted the existing joint-employer standard.<sup>17</sup> The NLRB acknowledged the evolution of its joint-employer standard, from an early decision in 1965 to its 1984 precedential decisions, which had established a finding of a joint employer where entities "share or codetermine those matters governing the essential terms and conditions of employment."<sup>18</sup> The Board further acknowledged that 1984 "marked the beginning of a 30-year period during which the Board—without any explanation or even acknowledgment and without overruling a single prior decision—imposed additional requirements that effectively narrowed the joint-employer standard."<sup>19</sup>

The majority, in revisiting the joint-employer standard, described both the policies of the NLRA and the diversity of modern workplace arrangements before "restating" the joint-employer standard and returning to the traditional test previously used by the Board.<sup>20</sup> The Board,

<sup>&</sup>lt;sup>11</sup> See id. § 152.

<sup>&</sup>lt;sup>12</sup> See Standard for Determining Joint Employer Status, 87 Fed. Reg. 54,641 (Sept. 7, 2022) (to be codified at 29 C.F.R. pt. 103) (citing Browning-Ferris Industries of Pennsylvania, Inc., 259 NLRB 148 (1981), *enforced*, 691 F.2d 1117 (3d Cir. 1982)).

<sup>&</sup>lt;sup>13</sup> Browning-Ferris Industries of California, Inc., 362 NLRB 1599 (2015), *aff'd in part*, 911 F.3d 1195 (D.C. Cir. 2018). <sup>14</sup> *Id.* at 1600–04.

<sup>&</sup>lt;sup>15</sup> Browning-Ferris Industries of California, Inc., No. 32-RC-109684, 2013 WL 8480748 (N.L.R.B. Aug. 16, 2013).

<sup>&</sup>lt;sup>16</sup> See TLI, Inc., 271 NLRB 798 (1984); Laerco Transportation, 269 NLRB 324 (1984).

<sup>&</sup>lt;sup>17</sup> Browning-Ferris Industries of California, Inc., 362 NLRB at 1613.

<sup>&</sup>lt;sup>18</sup> Id. at 1608.

<sup>&</sup>lt;sup>19</sup> Id.

<sup>&</sup>lt;sup>20</sup> *Id.* at 1613.

acknowledging the increased use of staffing arrangements and contingent workers in the modern workplace, observed:

This development is reason enough to revisit the Board's current joint-employer standard.... If the current joint-employer standard is narrower than statutorily necessary, and if joint-employer arrangements are increasing, the risk is increased that the Board is failing in what the Supreme Court has described as the Board's "responsibility to adapt the Act to the changing patterns of industrial life."<sup>21</sup>

The majority concluded that the prior standard (i.e., that two or more entities would be considered joint employers of a single workforce if they are employers under common law and if they share or codetermine matters governing the employees' essential terms and conditions of employment) would be the standard going forward.<sup>22</sup> The majority indicated that the Board would consider the various ways in which joint employers may share control or codetermine the terms and conditions of employment in its evaluation of the allocation and exercise of each employer's control in the workplace.<sup>23</sup> The Board would no longer require that employers exercise direct control over these matters. Instead, joint-employer status could be established even if an employer's control over employment matters was indirect or reserved by contract.<sup>24</sup> The majority explained that consideration of an entity's indirect or reserved control over workers was consistent with common law principles and that these principles recognize an individual as being employed by an entity if he or she is subject to its control or right to control. According to the majority, the Board's prior standard disregarded consideration of an entity's right to control workers, particularly when that right is not exercised: "Just as the common law does not require that control must be exercised in order to establish an employment relationship, neither does it require that control (when it is exercised) must be exercised directly and immediately .... "25

Applying the "restated" joint-employer standard to the case at hand, the majority concluded that Browning-Ferris and Leadpoint were joint employers of the relevant workers.<sup>26</sup> The majority identified examples of direct, indirect, and reserved control over the Leadpoint workers shared by both Browning-Ferris and Leadpoint, including Browning-Ferris's unilateral control over certain facility functions that had a direct connection to work performance, Browning-Ferris's requirement that all applicants pass drug tests, and Browning-Ferris's retained right to reject any worker referred by Leadpoint.<sup>27</sup>

### NLRB's 2020 Joint-Employer Standard

In 2018, the U.S. Court of Appeals for the District of Columbia Circuit upheld the restated jointemployer standard established in *Browning-Ferris Industries*, indicating "that both reserved authority to control and indirect control can be relevant factors in the joint-employer analysis."<sup>28</sup> The court remanded the case, however, contending that the NLRB's consideration of Browning-Ferris's indirect control over the Leadpoint workers failed to distinguish between control over essential terms and conditions of employment and control that is part of "ordinary third-party

<sup>&</sup>lt;sup>21</sup> Id. at 1609.

<sup>&</sup>lt;sup>22</sup> *Id.* at 1613.

<sup>&</sup>lt;sup>23</sup> Id.

<sup>&</sup>lt;sup>24</sup> *Id*. at 1614.

<sup>&</sup>lt;sup>25</sup> *Id.* at 1612.

<sup>&</sup>lt;sup>26</sup> *Id*. at 1616.

<sup>&</sup>lt;sup>27</sup> *Id.* at 1616–17.

<sup>&</sup>lt;sup>28</sup> Browning-Ferris Industries of California, Inc., v. NLRB, 911 F.3d 1195, 1222 (D.C. Cir. 2018).

contracting relationships."<sup>29</sup> Explaining the difference between these two forms of indirect control, the court observed:

To inform the joint-employer analysis, the relevant forms of indirect control must be those that "share or co-determine those matters governing essential terms and conditions of employment." By contrast, those types of employer decisions that set the objectives, basic ground rules, and expectations for a third-party contractor cast no meaningful light on joint-employer status.<sup>30</sup>

Remanding the case to the NLRB, the D.C. Circuit also indicated that the Board "should keep in mind" whether the retroactive application of a new joint-employer standard to Browning-Ferris and Leadpoint was appropriate.<sup>31</sup>

In 2020, following a change in the NLRB's composition, the Board concluded that a retroactive application would be "manifestly unjust" and indicated that there was "no need to clarify and refine the joint-employer standard" that had been applied by the NLRB regional director in 2013.<sup>32</sup> The Board's decision effectively endorsed the use of a standard that emphasized direct and immediate control over conditions of employment.

The NLRB's 2020 decision came after the Board issued a new joint employer rule in February 2020 that actually required a showing of direct and immediate control over individuals' terms or conditions of employment to be deemed a joint employer.<sup>33</sup> Under the Board's 2020 rule, an entity would be found to be a joint employer of a separate employers' employees "only if the two employers share or codetermine the employees' essential terms or conditions of employment."<sup>34</sup> The Board explained, however, that it had modified the definition of "share or codetermine" and that, under the revised joint-employer standard, an entity would be considered a joint employer of another entity's employees (e.g., share or codetermine the employees' essential terms or conditions of employment) if it possessed and exercised "substantial direct and immediate control" over one or more essential terms or conditions of their employment.<sup>35</sup> The rule further defined "substantial direct and immediate control" to mean "direct and immediate control that has a regular or continuous effect on an essential term or condition of employment of another employer's employees."<sup>36</sup> Control was not "substantial" if it was "only exercised on a sporadic, isolated, or de minimis basis."<sup>37</sup>

Unlike the *Browning-Ferris Industries* standard, which permitted a joint employer determination even if an entity did not exercise direct control over employees' essential terms and conditions of employment, the 2020 rule required that an entity possess and exercise substantial direct and immediate control over these matters in order to be deemed a joint employer. Under the rule, only this level of control "would warrant finding that the employer meaningfully affects matters relating to the employment relationship with those employees."<sup>38</sup>

<sup>37</sup> Id.

<sup>&</sup>lt;sup>29</sup> Id.

<sup>&</sup>lt;sup>30</sup> *Id.* at 1219-20.

<sup>&</sup>lt;sup>31</sup> *Id.* at 1222.

<sup>&</sup>lt;sup>32</sup> Browning-Ferris Industries of California, Inc., 369 NLRB No. 139 (N.L.R.B.) (2020).

<sup>&</sup>lt;sup>33</sup> Joint Employer Status Under the National Labor Relations Act, 85 Fed. Reg. 11,184 (Feb. 26, 2020) (to be codified at 29 C.F.R. pt. 103).

<sup>&</sup>lt;sup>34</sup> *Id.* at 11,235.

<sup>&</sup>lt;sup>35</sup> Id.

<sup>&</sup>lt;sup>36</sup> *Id.* at 11,236.

<sup>&</sup>lt;sup>38</sup> *Id.* at 11,235.

Several businesses and trade associations generally expressed support for the 2020 rule, praising the adoption of clear criteria for determining joint-employer status.<sup>39</sup> Some labor organizations, however, criticized the rule. The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), for example, described the rule as a "step backward in modernizing our outdated labor laws."<sup>40</sup>

### NLRB's 2023 Joint-Employer Standard

In 2022, a newly composed NLRB proposed the rescission of the 2020 joint-employer rule and the adoption of a new standard that was more consistent with *Browning-Ferris Industries*.<sup>41</sup> The Board contended that the 2020 rule inappropriately constrained the joint-employer standard by emphasizing an entity's direct and immediate control over individuals' terms or conditions of employment. The Board explained that a new standard was needed because "the 2020 final rule ... repeats the errors that the Board corrected" in *Browning-Ferris Industries*.<sup>42</sup> The Board also observed that the NLRA's purposes of promoting collective bargaining and stabilizing labor relations are best served when two or more entities that each "possess some authority to control or exercise the power to control employees' essential terms and conditions of employment are parties to bargaining over those employees' working conditions."<sup>43</sup>

The NLRB finalized a new joint-employer standard on October 27, 2023.<sup>44</sup> Under the new standard, two or more employers of the same particular employees are considered joint employers of those employees if they share or codetermine those matters governing employees' essential terms and conditions of employment. The Board has defined the phrase "share or codetermine those matters governing employees' essential terms and conditions of employment" to mean that an employer "possess[es] the authority to control (whether directly, indirectly, or both), or ... exercise[s] the power to control (whether directly, indirectly, or both), one or more of the employees' essential terms and conditions of employment."<sup>45</sup> The Board has also defined the phrase "essential terms and conditions of employment" to mean the following employment matters:

- (1) Wages, benefits, and other compensation;
- (2) Hours of work and scheduling;
- (3) The assignment of duties to be performed;
- (4) The supervision of the performance of duties;

<sup>(5)</sup> Work rules and directions governing the manner, means, and methods of the performance of duties and the grounds for discipline;

<sup>&</sup>lt;sup>39</sup> See, e.g., News Release, Associated Builders and Contractors, ABC Applauds the NLRB Joint Employer Final Rule (Feb. 25, 2020), https://www.abc.org/News-Media/News-Releases/abc-applauds-the-nlrb-joint-employer-final-rule.

<sup>&</sup>lt;sup>40</sup> Press Release, AFL-CIO, Trump Administration's Politicized NLRB Rule is an Attack on Working People's Freedom (Feb. 25, 2020), https://aflcio.org/press/releases/trump-administrations-politicized-nlrb-rule-attack-working-peoples-freedom.

<sup>&</sup>lt;sup>41</sup> Standard for Determining Joint-Employer Status, 87 Fed. Reg. 54,641 (Sept. 7, 2022) (to be codified at 29 C.F.R. pt. 103).

<sup>&</sup>lt;sup>42</sup> *Id.* at 54,642.

<sup>&</sup>lt;sup>43</sup> *Id.* at 54,645.

<sup>&</sup>lt;sup>44</sup> Standard for Determining Joint Employer Status, 88 Fed. Reg. 73,946 (Oct. 27, 2023) (to be codified at 29 C.F.R. pt. 103

<sup>45</sup> Id. at 73,956.

- (6) The tenure of employment, including hiring and discharge; and
- (7) Working conditions related to the safety and health of employees.<sup>46</sup>

The Board's focus on these seven employment matters is different from the proposed rule, which did not limit what could be considered essential terms and conditions employment. Under the proposed rule, the phrase would have "generally include[d], but [was] not limited to" employment matters such as hours of work and scheduling.<sup>47</sup> The Board indicated that the change that appears in the final rule was in response to commenters who advocated for greater clarity and predictability.<sup>48</sup> By limiting the relevant essential terms and conditions of employment to seven specified employment matters, the Board also addressed, in part, concerns from the franchise industry. Some franchisors had argued that their efforts to maintain brand-recognition standards could possibly be viewed as having a connection to employees' essential terms and conditions of employment.<sup>49</sup> According to the Board, the exhaustive list of employment matters should provide "clearer guidance to franchisors about the forms of control that the Board will find relevant to a joint-employer inquiry."<sup>50</sup>

Despite the clarification, the franchise industry remains a critic of the new joint-employer standard.<sup>51</sup> It contends that the rule will create uncertainty in the relationship between franchisors and franchisees. In November 2023, the International Franchise Association joined the U.S. Chamber of Commerce and others to challenge the new rule.<sup>52</sup> The lawsuit, filed in the U.S. District Court for the Eastern District of Texas, alleges that the rule is contrary to law and violates the Administrative Procedure Act.<sup>53</sup> On February 22, 2024, the court delayed the rule's effective date from February 26, 2024, to March 11, 2024.<sup>54</sup>

#### **Considerations for Congress**

On November 9, 2023, Senator Bill Cassidy and Representative John James introduced joint resolutions—S.J. Res. 49 and H.J. Res. 98—providing for congressional disapproval of the 2023 joint-employer rule under the Congressional Review Act (CRA).<sup>55</sup> The sponsors contend that the rule burdens small businesses and harms the franchise model.<sup>56</sup> On January 12, 2024, the House of Representatives passed H.J. Res. 98 by a vote of 206-177. The measure was received in the Senate on January 16, 2024. If both chambers were to pass the joint resolution and the President signed it or Congress overrode the President's veto, the rule would not be permitted to take

<sup>46</sup> Id.

<sup>48</sup> Id.

<sup>&</sup>lt;sup>47</sup> *Id.* at 73,963.

<sup>&</sup>lt;sup>49</sup> *Id.* at 73,971.

<sup>&</sup>lt;sup>50</sup> Id.

<sup>&</sup>lt;sup>51</sup> Issue: Joint Employer, International Franchise Association, https://www.franchise.org/advocacy/brand-standards/joint-employer (last visited Dec. 29<sup>th</sup>, 2023).

<sup>&</sup>lt;sup>52</sup> Complaint for Declaratory and Injunctive Relief, Chamber of Commerce v. NLRB, No. 6:23-cv-00553 (E.D. Tex. Nov. 9, 2023).

<sup>&</sup>lt;sup>53</sup> *Id.* at 3. For background on the Administrative Review Act, *see* CRS Legal Sidebar LSB10558, *Judicial Review Under the Administrative Procedure Act (APA)*, by Jonathan M. Gaffney.

<sup>&</sup>lt;sup>54</sup> Order, Chamber of Commerce v. NLRB, No. 6:23-cv-00553 (E.D. Tex. Feb. 22, 2024), https://www.law360.com/articles/1805968/attachments/0.

<sup>&</sup>lt;sup>55</sup> S.J. Res 49, 118th Cong. (2023); H.R.J. Res. 98, 118th Cong. (2023).

<sup>&</sup>lt;sup>56</sup> See Press Release, supra note 5.

effect.<sup>57</sup> A rule that does not take effect "may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule."<sup>58</sup>

If efforts to invalidate the joint-employer rule under the CRA were unsuccessful, it seems possible that opponents of the rule could work to amend the NLRA to statutorily require evidence of direct and immediate control over individuals' terms or conditions of employment. The Save Local Business Act (SLBA), for example, would amend the NLRA's definition of "employer" to state:

An employer may be considered a joint employer of the employees of another employer only if each employer directly, actually, and immediately, exercises significant control over the essential terms and conditions of employment of the employees of the other employer, such as hiring such employees, discharging such employees, determining the rate of pay and benefits of such employees, supervising such employees on a day-to-day basis, assigning such employees a work schedule, position, or task, or disciplining such employees.<sup>59</sup>

The House of Representatives passed a substantially similar version of the SLBA during the 115th Congress, but the bill has never been considered by the Senate.<sup>60</sup>

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<sup>&</sup>lt;sup>57</sup> See 5 U.S.C. § 801(b)(1).

<sup>&</sup>lt;sup>58</sup> *Id.* § 801(b)(2).

 $<sup>^{59}</sup>$  H.R. 2826, 118th Cong. § 2(a)(2) (2023); S. 1261, 118th Cong. § 2(a)(2) (2023).

<sup>60</sup> H.R. 3441, 115th Cong. (2017).